

Prepared Remarks of Mr. Richard Trenery, President
U.S. Transit Suppliers Coalition
Before the
U.S. House of Representatives
Committee on Transportation and Infrastructure
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Mr. Chairman and members of the Committee, my name is Richard Trenery and I am vice president and regional manager for Cubic Transportation Systems, Inc. Based in San Diego, Cubic is the world's leading turnkey solution provider of automated fare collection systems for public transport including bus, bus rapid transit, light rail, commuter rail, heavy rail, ferry and parking. Cubic's solutions and services include system design, central computer systems, equipment design and manufacturing, device-level software, integration, test, installation, warranty, maintenance, computer hosting services, call centre services, card management and distribution services, financial clearing and settlement, multi-application support and outsourcing services. Every year, nearly 10 billion rides are taken worldwide using Cubic fare collection systems. While most international technology transfer in the transit industry is from foreign markets into the US Cubic is perhaps the preeminent example of a domestic manufacturer that is successfully bringing US technology to world markets in Europe, Asia and elsewhere.

I also serve as president of the U.S. Transit Suppliers Coalition, a trade association consisting of more than two dozen U.S. manufacturers that supply products for mass transit programs. The Coalition strongly supports the Buy America statutory requirements for the purchase of products manufactured in the U.S. in federally-funded transit contracts. It is as a representative of the Coalition that I'd like to take a few minutes to share our story with you, explain our concerns and urge continued congressional vigilance as to ongoing enforcement of Buy America

First a bit of history: "Buy America" represents a 30-year consensus amongst private and public sector interests on Capitol Hill and within the industry itself. Since its inception, this important statute has served as the basis for the investment of hundreds of millions of dollars in American manufacturing facilities and the creation of thousands of manufacturing jobs. The goal is to maintain a vibrant domestic economy and higher rates of employment, accomplished in part by Federal Transit Administration -funded projects. It is also to ensure that US transit systems have an assured source of domestic supply to meet their ongoing needs.

Several years ago the U.S. Transit Suppliers Coalition was formed out of necessity: Despite "Buy America's" obvious value, it had become clear to many observers that "Buy America" as administered had been increasingly misinterpreted, exploited and manipulated to the detriment of U.S. workers and the economy.

Since that time the Coalition has worked to do its part to preserve existing transit supplier jobs, encourage the recycling of taxpayer dollars in the U.S. and help strengthen the nation's economy. Our member companies worked with decision-makers, including

members of this committee, toward the goal of preserving the spirit and intent of the “Buy America” provisions in federal law relating to public transit. We pushed for a relatively simple legislative “tune-up” of “Buy America” to realign the statute with the realities of today’s marketplace: after there has occurred much technological change in the twenty years since the original Buy America legislation and regulations were enacted.

The Coalition responded with a positive approach designed to clarify “Buy America” and make it more open and accountable. Our coalition advocated a common-sense solution centered around three key improvements to the law:

Keep Buy America up with the times –Amend the law to eliminate any confusion and reflect the current marketplace.

Close existing loopholes –Eliminate the temporary and overly broad microprocessor exemption and minimize use of an ambiguous and broadly defined “complex system” as an end-product. These loopholes often allowed companies that do not manufacture public transit equipment in the U.S. to profit from taxpayer dollars.

Put “teeth” in the law –Require open and accountable enforcement procedures.

Through advertising, congressional meetings, industry events, newspaper articles and coverage by television shows such as *Lou Dobbs*, the Coalition worked to educate stakeholders and opinion leaders and spread the word about Buy America reform. At long last, in passing SAFETEA-LU, Congress made clear that it too wanted the FTA to specifically promulgate regulations that would ensure that the Buy America requirements and goals would not be circumvented by an expansive use of the microprocessor waiver and the bundling of complex systems into so-called end products as a means to circumvent Buy-America compliance. I want to thank this Committee in particular for its careful and thoughtful consideration of our views and its specific language, both legislatively and by letter, directing that the FTA follow congressional guidance in its rulemaking process.

Mr. Chairman, as you are aware, the FTA is now in the process of reviewing public comments submitted in response to the FTA’s Second Notice of Proposed Rulemaking. We believe that the FTA’s Second Notice of Proposed Rulemaking is a step in the right direction toward compliance with the letter and spirit of the congressional directive as it applies to Buy America. However, we continue to have concerns with two critical elements of the SNPRM.

First, FTA’s proposed factors that can be used to distinguish between when a system truly is an end product and when it is designated as an end product as a way to avoid Buy America requirements is an acknowledgement of the problem and a step in the right direction toward a workable definition. However, in its SNPRM, FTA continues to propose a definition of “end product” that includes systems. This clearly undermines the spirit and intent of Buy America.

The inherent problem with FTA’s proposal is that it does not definitively state how these factors will be used to determine whether a system is being improperly designated as an

“end product.” While the Coalition proposed a bright line test that would provide clear guidance to grantees and contractors, the FTA’s proposed rule provides no such clear guidance and leaves the entire determination to the discretion of the FTA. This was not the intent of Congress. Moreover, it will create confusion in the marketplace and no doubt will result in numerous administrative challenges. To avoid this result, FTA should institute mandatory tests which would define certain characteristics of end products: We recommend the following:

- (1) the solicitation provides separate line item pricing for individual product elements,
- (2) the solicitation provides for performance warranties for individual or separable product elements (other than warranties relating to degraded mode operation), thereby demonstrating that individual elements can fully perform independently, or
- (3) items identified in the solicitation that constitute the system are regularly sold separately and can function independently of the system.

In solicitations where circumstances as I have described are present, then those individual items or elements identified in the solicitation shall be considered end products rather than the system.”

If examination of one or more of these factors in the context of a proposed system characterization suggests that the individual system elements could be treated as a discrete end product, then the grantee and the FTA should so determine that the system characterization is inappropriate. This should not be discretionary.

As I’ve described, the Coalition is concerned that the definitions of “end product” and “system” in the FTA’s proposal continue to allow contractors and grantees to reach the improper conclusion that a fare collection system is an end product. One way to eliminate the possibility of reaching such an incorrect conclusion is to set up a bright line test as I’ve described. Another way is to simply state in either the definition of “end product” or “system” that if a product is listed as an “End Product” it will remain an end product (and cannot be considered a component or a subcomponent) when included in a solicitation for a system. This is another straightforward bright line test that does not depend upon FTA’s discretionary judgment and cannot be misconstrued by contractors and grantees.

However, FTA’s proposal -- establishing factors that it may consider in determining whether a system constitutes an end product or is instead made up of independent end products -- does not provide mandatory bright lines for contractors and grantees to follow in determining whether a system is an end product. The Coalition believes that such bright lines are necessary to avoid the current practice of designating a complex system, such as a fare collection system, as an “end product” when the system is in fact made up of independent products that come with separate performance warranties and can and do function on a standalone basis. It is this practice, which undermines the Buy America

statutory requirements that caused Congress to step in and direct the FTA to stop, by issuing new rules.

Put simply, Congress perceived the old interpretation of major systems and end products as a circumvention of Buy America and directed FTA to define “end product” in a way that major systems cannot be used to reduce the number of items that must be manufactured in the U.S. Again, a mandatory “bright line” test is required to put an end to existing confusion and avoid dependence on FTA’s discretionary judgment.

Second, we strongly supported the FTA’s proposed description of the microprocessor waiver, limiting its applicability to microprocessors, computers, microcomputers or other devices which are used solely for the purpose of processing or storing data. In the past, contractors and grantees had in several instances misinterpreted the waiver to include devices that incorporated microprocessors, but performed functions beyond the processing and storage of data. This misinterpretation greatly expanded the number of foreign-made products that could be purchased on federally-funded transit projects. In SAFETEA-LU, Congress acted to stop this practice and instructed FTA to clarify the waiver so that it was limited to microprocessors used for the processing and storage of data. FTA’s proposed language addressed Congressional concerns.

However, FTA’s discussion of “input/output” facilities in the Supplementary Information section of the SNPRM creates confusion by suggesting that input/output devices are included in the microprocessor waiver. Such devices do more than process or store data and, if exempted will open the door to an expansive misinterpretation of the waiver and allow an increase in foreign-made products purchased using U.S. taxpayer dollars. To avoid an unintended increase in the scope of the waiver, FTA must make clear that the waiver is limited solely to devices used for processing or storing of data.

Mr. Chairman, my industry and thousands of taxpaying U.S. workers thank this committee for its inspired leadership role regarding reforming Buy America. We trust that you will continue to monitor the FTA as it finalizes its Buy America regulations, and we look forward to continuing to manufacture products that help keep this country on the move. Thank you.